

ETHICS THE MOVIE IV

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Presented by

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&

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

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ETHICS: The Movie IV

By
Judge Steve Wilson & Tom Lockridge

Ethics: The Movie IV

- Arizona Rules of Professional Responsibility
- National Prosecution Standards
- No political statements
- Program designed for thinking and discussion

- OPENING SEQUENCE

Legal Advisor

- [National Prosecution Standards 2-5.6](#)

Although law enforcement agencies or individual law enforcement officers are not clients in criminal cases or employees of the prosecutor's office, the prosecutor may provide independent legal advice to local law enforcement agencies concerning specific prosecutions.

- Advice should be limited to criminal cases.

Legal Advisor

- [National Prosecution Standards 2-5.6](#)

This advice may include the proper interpretation of the criminal laws, the sufficiency of evidence to commence criminal charges or arrest, the requirements for obtaining search warrants for physical evidence and electronic surveillance, and similar matters relating to the investigation of criminal cases.

Legal Advisor

- [National Pros. Standards 2-5.6 Commentary:](#)

...Furthermore, the prosecuting attorney may be restricted from any active participation in the police function by the threatened loss of immunity to civil damages in instances where participation is beyond the scope of advisor and, therefore, not an integral part of the judicial process.

Prosecutor Liability

- Absolute Immunity- for initiating a charge, for presenting the prosecution case and for other actions “closely associated with the judicial process.”
- Qualified Immunity- objective standard creating liability only where the official violates clearly established statutory or constitutional rights that a reasonable person would have known.

- The Shooting scene

Police Officer’s Rights

- “Critics say Illinois’ 30-year-old law establishes two sets of rules – one for police officers and one for average citizens. And combined with police union contracts, which lay out further protections for officers, advocates for police reform say the law complicates efforts to address police misconduct in Chicago and elsewhere.”
- The Chicago Reporter (after the Freddie Gray death)

FIRST INTERVIEW WITH DASH

Issue Spotting

- No Miranda warnings- Custody?
- Dash asks for a lawyer
- Tom lies about police academy
- Tom questions about shooting case

Relations with Defendants

- [National Pros. Standards 2-7.5](#)
... if the defendant changes his mind and expresses a desire to obtain counsel or to have counsel present, the prosecutor should terminate the communication in order to allow the defendant to obtain counsel or to secure the presence of his or her counsel.

Special Responsibilities of the Prosecutor

- [A.R.P.C. Rule 3.8](#)

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.

Unrepresented Persons

- [A.R.P.C. Rule 4.3](#)

In dealing with an unrepresented person, a lawyer shall not “state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

False Statements

- [A.R.P.C. Rule 4.1\(a\)](#)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person;

The No Contact Rule

- [A.R.P.C. Rule 4.2](#)

... a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Relations with Defendants

- [National Pros. Standards 2-7.5](#)

A prosecutor may communicate with a witness who is also charged as a defendant in an unrelated criminal matter about the witness's upcoming testimony without the advance permission of the witness's attorney so long as the prosecutor does not discuss the criminal charges pending against the witness.

- Who should interview Hicks scene

Officer Involved Shootings Investigations

- Do you have a plan?
- Who gets notified? Do you have an “on call” list?
- Prosecutor on the list to be notified?
- What agency should investigate?
- Who handles the scene/evidence collection?
- Is there a specific protocol for the investigators?

Officer Involved Shootings Investigations

- Does the protocol call for: (1) the immediate separation and sequestration of all key witnesses and all involved officers?
- (2) Involved officers are separated at the scene?
- (3) and sequestered with restricted visitation until a formal voluntary statement is taken?
- (4) A log is kept to document who has contact with the officer? This is done to insure totally independent statements and to avoid even the appearance of collusion.

Officer Involved Shootings Who should Prosecute?

- “A common thread in many of these cases is the belief of the victim’s family and others that the investigation of the death, and the decision whether to prosecute, have been improperly and unfairly influenced by the close working relationship between the county District Attorney and the police officers he or she works with and depends on every day.” From N.Y. State Office of the A.G. Schneiderman (Dec. 8, 2014)

Officer Involved Shootings Charging Decision

- Charging decision and prosecution by local prosecutor
- Direct presentation to Grand Jury
- Attorney General's Office as Special Prosecutor
- Cross-designation of Federal prosecutors to bring charges under state law.

Officer Involved Shootings Prosecution

- Most protocols provide that the DA should "assist and advise the Task Force on various criminal law and criminal procedure issues which may arise." Further that the DA should act as the sole source of legal advice on issues affecting the criminal investigation.
- In the event of a legal conflict of interest, the Task Force may seek legal advice from the Attorney General's Office.

Officer Involved Shootings: Decision not to prosecute

- "If criminal charges are not filed, a decision letter describing the shooting and the legal conclusions is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, the Executive Director of the Department of Safety, other appropriate persons, and the media...A copy of the decision letter is also posted on the prosecutor website so that members of the public may learn the facts of the incident and the reasons for the decision.

Officer Involved Shootings
Investigation file

- The file of the District Attorney's Office is available and open to the public for review, unless a criminal case is pending concerning the facts of the shooting. Allowing our file to be reviewed permits interested members of the public to learn more about the investigation; to verify that our description of the facts in the decision letter is accurate; to verify that our decision is supported by the facts.

- INTERVIEW WITH HICKS

Officer Involved Shootings Investigations

- Strategy: Be there or not?
- How get prior disciplinary file?
- Grand jury investigation?

- Williams never saw a gun, black lives matter coming

Scope of Considerations

- **A.R.P.C. 2.1**

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”

- News report on TV, Hands up don't shoot

High Profile Investigations

- Inaccurate reporting... Fake News!!
- Social Media?
- Topics?
- Press release response?

Pretrial Publicity

- **A.R.P.C. Rule 3.6**
(a) A lawyer participating in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

- Call that US Attorney taking case- then not

Officer Involved Shootings Investigations

- You are the prosecutor of crimes in your jurisdiction!
- You make the decision that is right for you and your case!
- Don't rely on anybody else!

Officer Involved Shootings Investigations

- [Graham v. Conner 490 U.S. 386 \(1989\)](#)
As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.

- Dash Riprock on open mic

High Profile Investigations

- Now beneficiary of highly inflammatory and prejudicial publicity!!
- Works both ways- but can still create problems for the prosecution.
- Jury selection problems. Change of venue?

- Elevator- get dash tape to use at Grand Jury

Prior Bad Acts

- **Arizona Evidence Rule 404(b) Evidence of other crimes** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may be admissible for another purpose (motive, opportunity, plan, intent, identity etc.)

Grand Jury Evidence

- [Costello v. U.S. 350 U.S. 359 \(1956\)](#)

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed... This is not required by the Fifth Amendment.

Grand Jury Evidence

- [National Prosecution Standards 3-3.5](#)

Unless otherwise required by the law or applicable rules of ethical conduct of the jurisdiction, the following should apply to evidence presented to the grand jury:

- a. A prosecutor should disclose any credible evidence of actual innocence known to the prosecutor or other credible evidence that tends to negate guilt, as required by law or applicable rules of ethical conduct;
- b. A prosecutor should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement;

Grand Jury Evidence

- [3-3.5 Evidence Before the Grand Jury](#)

- c. In the absence of a valid waiver, a prosecutor should not seek information from a witness that the prosecutor knows or believes is covered by a valid claim of attorney-client privilege;
- d. A prosecutor should not take any action that could improperly influence the testimony of a grand jury witness;

Grand Jury Evidence

• 3-3.5 Evidence Before the Grand Jury

e. If the prosecutor is convinced in advance of a grand jury appearance that any witness will invoke his or her Fifth Amendment privilege against self incrimination rather than provide any relevant information, the prosecutor should not present the witness to the grand jury unless the prosecutor plans to challenge the assertion of the privilege or to seek a grant of immunity. The grand jury may be informed of the reason the witness will not appear;

Grand Jury Evidence

• 3-3.5 Evidence Before the Grand Jury

- f. The prosecutor should inform the grand jury that it has the right to hear in person any available witness or subpoena pertinent records;
- g. A prosecutor should not present evidence to the grand jury that the prosecutor knows to be false;
- h. A prosecutor should not knowingly make a false statement of fact or law to the grand jury.

- FORTE SLAMS TOM ON RADIO

Pretrial Publicity

- **A.R.P.C. Rule 3.6**

(a) A **lawyer** participating in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Pretrial Publicity

- “The conduct of the prosecutor has been outrageous... swept under rug”
- “Violence to a black victim doesn’t matter to Tom Locker... Black Lives Matter”
- “Standing on sidewalk, hands up don’t shoot”...
- “Making video of illegal arrest of Dash... shot in cold blood”
- “They have the whole thing on video”

Pretrial Publicity

- “We have it on good authority that Jimmy Hicks is a known liar and has killed others while working for the police.”
- “He should have been arrested on day one... Locker protecting a serial killer.”
- “Ten month paid vacation... we won’t let the voters forget.”

- TOM GIVES REBUTTAL PRESS CONFERENCE

Pretrial Publicity

- [A.R.P.C. Rule 3.6](#)
(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Pretrial Publicity

- [A.R.P.C. Rule 3.8 \(f\)](#)
Except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action **and** that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . .

Special Responsibilities of the Prosecutor

- **A.R.P.C. Rule 3.8(f)**
... and exercise reasonable care to prevent investigators, law enforcement, or employees of the prosecutor's office from making extrajudicial statements the prosecutor would be prohibited from making under Rule 3.6 or this Rule. under Rule 3.6 or this rule.

Pretrial Publicity

- "The ten month delay had nothing to do with my office..."
- "Four months for Medical Examiner and crime lab..."
- "Told to stand down by US Attorney."
- "Initiated a review of investigation."
- "Hands up, don't shoot" request for help from public.
- "Will prosecute to the fullest extent of the law."

Pretrial Publicity

- "We plan to present Dash to Grand Jury in two weeks."
- "Play tape, damning expression of attitude toward women."
- "He is a rapist plain and simple."
- "After seeing tape no sensible jury could believe he is not guilty..."
- "She was in town for meeting at seminary..."

Pretrial Publicity

- Happily married, mother of two, sells Bibles...
- "She is a person of the highest character..."
- "We can't discuss lab results... one in thirteen billions is pretty good odds."
- "Dash made brief statement then asked for a lawyer, going to say consensual."
- "Good chance we will get a guilty plea..."

- Letter from Dash's lawyer wants Tom to read letter to GJ

Grand Jury Evidence

- **15A-626 No Right to Appear Without Consent**
(d) Any person not called as a witness who desires to testify before the grand jury must apply to the district attorney or to a superior court judge. The judge of DA in his discretion may call the witness to appear before the grand jury.

Grand Jury Evidence

- **3-3.5 Evidence Before the Grand Jury**

Unless otherwise required by the law or applicable rules of ethical conduct of the jurisdiction, the following should apply to evidence presented to the grand jury:

- a. A prosecutor should disclose any credible evidence of actual innocence known to the prosecutor or other credible evidence that tends to negate guilt, as required by law or applicable rules of ethical conduct;
- b. A prosecutor should not present evidence to the grand jury that the prosecutor knows was obtained illegally by law enforcement;

Grand Jury Evidence

- **3-3.5 Evidence Before the Grand Jury**

- f. The prosecutor should inform the grand jury that it has the right to hear in person any available witness or subpoena pertinent records;
- g. A prosecutor should not present evidence to the grand jury that the prosecutor knows to be false;
- h. A prosecutor should not knowingly make a false statement of fact or law to the grand jury.

Commentary

- **A.R.P.C. Rule 3.8 Commentary (1)**

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence., and that special precautions are taken to prevent and to rectify the conviction of innocent persons.

- Gun is lost

The Brady Rule

- [Brady v. Maryland 373 U.S. 83 \(1963\)](#)
“The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Lost Evidence

- [Arizona v. Youngblood](#) 488 U.S. 51(1988):
Unlike in Brady/Agurs test for clearly exculpatory and material evidence, in cases where evidence is discarded or destroyed, the good/bad faith of the government is entirely relevant, and the accused must show bad faith or ill motive underlying the destruction.

Material

- [Cone v. Bell](#) 129 S.Ct. 1769 (2009)
Evidence is “material” under Brady when there is a **reasonable probability** that, had the evidence been disclosed, the result of the proceeding would have been different.

Material

- [Kyles v. Whitley](#) 115 S.Ct. 1555 (1995)
A reasonable probability does not mean that the defendant “would more likely than not have received a different verdict” with the evidence, only that the likelihood of a different result is great enough to “undermine confidence” in the verdict.
- [Smith v. Cain](#), 132 S.Ct. 627 (2012)

Material

- [United States v. Agurs 427 U.S. 97 \(1976\)](#):
"Because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."

Special Responsibilities

- [A.R.P.C. Rule 3.8](#)
(d) The prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate guilt or mitigate the offense, and for sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor, unless relieved by a protective order of the tribunal.

- Jackass contacting GJ on Facebook

Ex Parte Communication

- **A.R.P.C. Rule 3.5**
A lawyer shall not:
(a) seek to influence a judge, juror, etc., by means prohibited by law;
(b) communicate ex parte with a juror or prospective juror except as permitted by law or court order;

Social Media Contact

- In the New York County Lawyers' Association, Formal Opinion 743 (May 18, 2011), the Committee held that "passive monitoring of jurors, such as viewing a publicly available blog or Facebook page" is permissible so long as lawyers have no direct or indirect contact with jurors during trial. Significantly, the NYCLA cautioned lawyers to "not act in any way by which the juror becomes aware of the monitoring."

Social Media Contact

- If, during monitoring of jurors' social networking sites, a lawyer learns of juror misconduct, "**the lawyer may not unilaterally act upon such knowledge to benefit the lawyer's client, but must . . . bring such misconduct to the attention of the court**, before engaging in any further significant activity in the case."

Social Media Contact

- [Sluss v. Commonwealth, 381 S.W.3d 215, \(Ky. 2012\)](#)

The Kentucky Supreme Court stated “The Commonwealth correctly argues that the Appellant must do more than simply speculate that the relationship might have somehow affected the jury verdict. Thus, the mere fact that Amy Sparkman–Haney and Virginia Matthews were April Brewer’s Facebook friends, which is the extent of the proof the trial court heard about their acquaintance, is not grounds for a new trial.”

Social Media Contact

- [Sluss v. Commonwealth, 381 S.W.3d 215, \(Ky. 2012\)](#)

It is proper and ethical under [Rule of Professional Conduct] 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to “friend” jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them.

Social Media Contact

- [Sluss v. Commonwealth, 381 S.W.3d 215, \(Ky. 2012\)](#) The lawyer should not communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any representations or engage in deceit, directly or indirectly, in reviewing juror social networking sites.

Social Media Contact

- A U.S. Attorney was forced to resign after he and an AUSA made hundreds of posts on a newspaper website criticizing the target of an environmental investigation. The posts were also critical of the presiding judges.

Social Media Contact

- An Assistant DA and son of a NY Supreme Court Judge had his Facebook page posted on national media. The page showed the lawyer in blackface, holding a Confederate flag, and simulating prison rape.

Social Media Contact

- In Minnesota, a prosecutor was accused of prosecutorial misconduct and improperly influencing the jury. She made comments on Facebook, during an attempted murder case, concerning her role as a prosecutor in “keep[ing] the streets of Minneapolis safe from the [Somalis]” (the defendant was a Somalian immigrant).

- Tom goes to tell Judge about Jackass

Reporting Misconduct

- **A.R.P.C. Rule 8.3**
A lawyer who knows that another lawyer has committed a violation of A.R.P.C. that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Candor Toward the Tribunal

- **A.R.P.C. 3.3 (d)**
"In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that which will enable the tribunal to make an informed decision, whether or not the facts are adverse."

- Grand Jury Presentation- Hicks and Williams Indicted

Prosecutor Duties

- [A.R.P.C. Rule 3.8 \(a\)](#)
The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

Commentary

- [A.R.P.C. Rule 3.8 Commentary \(1\)](#)
A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

- Going to withhold evidence from the defense while we negotiate

Fairness to opposing counsel

- [A.R.P.C. Rule 3.4 \(a\)](#)
A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

Fairness to opposing counsel

- [A.R.P.C. Rule 3.4 \(d\)](#)
A lawyer shall not in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

Special Responsibilities

- [A.R.P.C. Rule 3.8](#)

(d) The prosecutor shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate guilt or mitigate the offense, and for sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor, unless relieved by a protective order of the tribunal.

- Dash wants ROR bond

Amount of Bail

- [National Prosecution Standards 4-4.1](#)

A prosecutor should request that bail be set at an appropriate amount to ensure that the defendant appears at all required court proceedings, and, where allowed by law, does not pose a danger to others or to the community.

Amount of Bail

- [National Prosecution Standards 4-4.1](#)

Where permitted by law, a prosecutor should request that the defendant be held without bail if the prosecutor reasonably believes the accused: (a) Would present a danger to others or the community if he or she were released prior to trial; (b) Is likely to tamper with evidence, attempt to improperly influence witnesses, or otherwise interfere with the case; or (c) Is a substantial flight risk.

- Police hate Tom

Relations with Police

- [National Pros. Standards 2-5 Commentary](#)

The maintenance of good relations between the prosecuting attorney and the law enforcement agencies within the community is essential for the smooth functioning of the criminal justice system. Both parties have the burden of fostering, maintaining, and improving their working relationship and developing an atmosphere conducive to a positive exchange of ideas and information.

- Interview with Dash and Lawyer. Dash will lie for us

Issue Spotting

- Defendant on one case, witness on another and has counsel?
- Proffer?
- Plea negotiations statements admissible?
- Subpoena while in town for plea discussions?
- Dash willing to lie.
- Brady?

Relations with Witnesses

- [National Prosecution Standards 2-10.3](#)
When the prosecutor is informed that a witness has obtained legal representation with respect to the criminal proceeding, the prosecutor should arrange all out-of-court contacts with the witness regarding the subject of that proceeding through the witness's counsel.

Plea Negotiation Statements

[Arizona Rules of Evidence 410 Inadmissibility of plea related statements](#)

Statements made during plea negotiations are not admissible **against a defendant** who was a participant in the discussions with an attorney for the prosecution which do not result in a plea or a plea that is later withdrawn.

The Brady Rule

- Evidence must be favorable to the accused;
- The evidence must be possessed by the prosecution team; AND
- The evidence must be material.

Impeachment Information

- [Giglio v. United States, 405 U.S. 150\(1972\)](#):
When the reliability of a witness may well determine guilt or innocence, nondisclosure of evidence affecting credibility falls within the “Brady” rule.
See also [U.S. v. Bagley, 473 U.S. 667 \(1985\)](#).

Candor Toward the Tribunal

- **A.R.P.C. Rule 3.3(a)**
“A lawyer shall not knowingly:
(3) Offer evidence that the lawyer knows to be false.”

Fairness to Opposing Counsel

- **A.R.P.C. Rule 3.4**
A lawyer shall not:
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.

- Tom refuses to provide witness list

Fairness to Opposing Counsel

- **A.R.P.C. Rule 3.4**

A lawyer shall not:

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists;

Proper Decorum

- **A.R.P.C. Rule 3.5**

A lawyer shall not:

(d) engage in conduct intended to disrupt a tribunal.

- Jail calls between attorney and dash

Jail calls Privileged?

Attorney Client Privilege Elements:

- The relationship of attorney and client existed when the communication was made;
- The communication was made in confidence;
- The communication concerns a matter about which the attorney is being professionally consulted;
- The communication was made in the course of giving or seeking legal advice for a proper purpose, although litigation need not be contemplated; and
- The client has not waived the privilege.

Waiver

- Once a court finds that the attorney-client privilege applies, only the client can waive the privilege.
- The privilege is waived when the client voluntarily discloses the privileged information to someone other than his or her attorney.

Waiver

- [United States vs. Novak, 531 F. 3d 99 \(2008\)](#)
Inmates and pretrial detainees who have been exposed to the sort of warnings that Holyoke saw here have been deemed to have consented to monitoring.

Waiver

- [United States v. Lentz, 419 F. Supp. 2d 820, 835 \(Va. 2005\)](#) privilege did not apply to the phone call between an inmate and his attorney because the detention facility records all inmate calls and if the attorney wanted confidential and privileged contact he could visit or send mail to the inmate.

Waiver

- But see [United States v. Walker, \(M.D. Ala. July 14, 2011\)](#) holding that the attorney-client privilege protected a call between an inmate and his attorney because the recording on the prison phone system provided no indication that calls between an inmate and his or her attorney would be recorded.

- Tom calls Williams- going to lose house

The No Contact Rule

- **A.R.P.C. Rule 4.2**
... a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Fairness to Opposing Counsel

- **A.R.P.C. Rule 3.4**
“A lawyer shall not:
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party...”

Expediting Litigation

- **A.R.P.C. Rule 3.2**
“A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

- Tom gets call from victim's attorney

Prosecutor Duties

- [A.R.P.C. Rule 3.8 \(a\)](#)
The prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

Victim's Rights

- Most states provide victims in serious cases with the right to confer with the prosecuting attorney, to be informed of the procedural steps in the case and to be advised of plea offers made in the case.
- Marsy's Law

- Opens records request, request for GJ tape release

Open Records Request

- **Certain records exempt**
Records or information compiled and maintained by prosecutors pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of open or public records and generally remain exempted after enforcement action, including litigation, is completed or a decision is made to take no action.

Disclosure of Grand Jury

- **15A-623 Secrecy of Grand Jury** (e) Grand jury proceedings are secret and, except as expressly provided in this Article, members of the grand jury and all persons present during its sessions shall keep its secrets and refrain from disclosing anything which transpires during any of its sessions.

Officer Involved Shootings: Decision
not to prosecute

- "If criminal charges are not filed, a decision letter describing the shooting and the legal conclusions is sent to the Chief of Police by the District Attorney, with copies to the involved officer(s), the Mayor, City Council members, the Executive Director of the Department of Safety, other appropriate persons, and the media...A copy of the decision letter is also posted on the prosecutor website so that members of the public may learn the facts of the incident and the reasons for the decision.

Officer Involved Shootings
Investigation file

- The file of the District Attorney's Office is available and open to the public for review, unless a criminal case is pending concerning the facts of the shooting. Allowing our file to be reviewed permits interested members of the public to learn more about the investigation; to verify that our description of the facts in the decision letter is accurate; to verify that our decision is supported by the facts.

- Dash victim reaches civil settlement

Civil Settlement?

- What do we do with this situation?
- Can the victim settle your case?
- Can she refuse to testify based on a confidential civil settlement?

- New selfie video

New evidence

- When are we justified in making a new presentation to the grand jury?
- Grand Jury shopping?
- Double jeopardy?
- Always be sure to establish the authenticity of the new evidence

- Owens tells Hicks they have him

Confrontation

- Owens confronts Hicks!

- “One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth’s Attorney. Its very status becomes a mantle of power and respect to the wearer. . . No one except the judge himself is under a stricter obligation to see that every defendant receives a fair trial . . .”
[Niemeyer v. Commonwealth, 533 S.W.2d 218, 222 \(Ky. 1976\).](#)
